No. 4067

In the

United States Circuit Court of Appeals

For the Ninth Circuit

BANKERS DISCOUNT CORPORATION, a corporation, and COAST SHIPBUILDING COMPANY, a corporation,

Appellants,

vs.

STEAMSHIP "EGERIA", Her Masts, Bowsprit, Boats, Anchors, Cables, Rigging, Tackle, Apparel and Furniture, and F. H. RANSOM, Trustee, and J. V. MASON, and UNITED SHEET METAL WORKS, a corporation,

Appellees.

BRIEF OF APPELLANTS

Upon Appeal from the District Court of the United States for the District of Oregon.

WINTER & MAGUIRE,
703 Title and Trust Bldg., Portland, Oregon,
Proctors for Appellants.

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Corbett Bldg., Portland, Oregon,
Proctors for Appellees,

F. H. Ransom, Trustee, and J. V. Mason.

HOUGHTON-CARSON COMPANY, PRINTERS

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BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This is an appeal from a decree of the District Court of the United States for the District of Oregon, and arises out of the claims of lien against the Egeria pro-

pounded by F. H. Ransom as trustee under a mortgage which with principal and interest amounts to $43,716.95, by J. V. Mason for moneys alleged to have been advanced by him upon the credit of the vessel, amounting to $8,565.48, by the United Sheet Metal Works for work and material furnished the vessel in the amount of $367.34, and by the Bankers Discount Corporation, as assignee of the claim of the Coast Shipbuilding Company for repairs and alterations amounting to $53,286.70.

The District Judge, Honorable Charles E. Wolverton, decreed that the various claimants were entitled to liens in the amounts above scheduled, together with costs, and in the order of priority hereinafter set forth:

J. V. Mason	$ 8,565.48
F. H. Ranson, Trustee	43,716.95
United Sheet Metal Works	367.24
Bankers Discount Corporation	53,286.70

It was agreed between the parties that the United Sheet Metal Works were entitled to a lien that would be paid irrespective of the outcome of this appeal, and for that reason there is no contest as to the validity or priority of their lien.

In accordance with the decree the ship was sold by the Marshal for a sum sufficient to discharge the liens of Mason and Ransom.

From this decree the Bankers Discount Corporation

has appealed, and contends that its lien is superior to that of both Ransom and Mason.

There are only four questions in the case, namely:

1. Is the mortgage to Ransom, trustee, entitled to a preferred status under the Ship Mortgage Act of 1920;

2. Is the lien of the Bankers Discount Corporation prior to that of the Libellant Ransom;

3. Is Mason entitled to a lien in his own behalf, or are the lienable items in his claim tacked on to and really a part of the lien of Ransom, Trustee; and

4. Is his lien inferior to that of the Bankers Discount Corporation.

"The Egeria" was owned by a syndicate of individuals, firms and corporations residing in Oregon, principally in the city of Portland, among which was the Coast Shipbuilding Company. The total number of shares in the ship was 1000 of the value of $3500.00 each. Of these the Coast Shipbuilding Company was the owner of 39 for which it paid cash, the balance was owned by others, but the appellant, Bankers Discount Corporation, was not interested in the ship as an owner. (Apostles,)

"The Egeria" was built for the United States Emergency Fleet Corporation by the Wilson Shipbuilding

Company of Astoria. Upon its completion it was loaded and proceeded upon a voyage to Portland, Oregon, was unloaded, and after its purchase by the syndicate was towed to the dock of the Coast Shipbuilding Company to have alterations and repairs made upon it so as to fit for the off shore lumber carrying trade.

At the time of its purchase it was contemplated that the cost of the ship, together with cost of the repairs and alterations would not exceed $350,000.00, but the cost of labor and materials advancing, it exceeded that estimate by $48,856.99. This excess constitutes the basis of the claim of the appellants, inasmuch as the shareholders did not pay this excess into syndicate funds.

In order to complete the repairs and alterations, it became necessary to obtain additional funds and the Coast Shipbuilding Company borrowed $110,000.00 from the Bankers Discount Corporation from time to time, of which $8,000.00 was to pay delinquent insurance premiums on the ship and $10,000.00 to pay the wages of the crew. At the time of the first loan the Coast Shipbuilding Company agreed to assign to the Bankers Discount Corporation all claims and rights which it made against the ship as security. The formal assignment of the Shipbuilding Company's lien was not executed, however, until July 15, 1921. (Apostles)

On March 1st, 1921, the ship and its owners executed to F. H. Ransom as trustee a note and mortgage for

$35,000.00, bearing interest at 10%, and the funds for this loan were contributed by the shareholders in the ship. A default was made in the payment of interest and insurance premiums and a foreclosure was instituted by filing a libel for that purpose.

The appellant, Bankers Discount Corporation, filed its answer and cross libel setting up the lien of the Coast Shipbuilding Company and its assignment to the appellant, and the intervening libellant, Mason, filed a cross libel for his claim.

The lien of the Coast Shipbuilding Company is prior in time to the liens of both Ransom, trustee, and Mason, and is superior to that of Ransom without question, and to that of Mason as well if, as we believe, Mason's claim is properly tacked on to that of the trustee.

> New Bedford Dry Dock Company vs. Purdy, 258 U. S. 96, 100.

It is claimed, however, that the lien of the Coast Shipbuilding Company was waived in favor of the mortgage by the declaration of Donald Green, its secretary, and that Donald Green as secretary of the Shipbuilding Company has power and authority to waive the lien, and that the Discount Corporation as assignee thereof is also bound by his actions.

From Libellant's Exhibit 3 and A, and from the testimony of Paul C. Bates (Apostles, 87), L. A. Lewis (Apostles, 104), C. A. Parks (Apostles, 114), George E. Walker (Apostles, 116, 117), and Donald W. Green (Apostles 162), and from that of the trustee himself, it is apparent that certain of the shareholders in the ship loaned $35,000 to themselves, took a mortgage from themselves, and now claim this mortgage to be a first and preferred lien upon the ship.

POINTS AND AUTHORITIES

I.

The mortgage to Ransom, Trustee, is not entitled to a preferred status.

41 Statutes at Large, 1000.

II.

Even a mortgage of preferred status is inferior to a lien of the alterations and repairs.

41 Statutes at Large, 1000.

Sub-section M.

III.

One deals with an agent at his peril, and it is his duty to ascertain the nature and extent of the agent's authority.

Baker v. Seaweard, 63 Or. 350.

IV.

There is no presumption that the President or Secretary of a corporation has authority to dispose of the assets or property of the corporation.

Luse v. Isthmus T. & R. Co., 6 Or. 125.
Bell & Co. v. Vogt, 87 Or. 102.

V.

The officers of a corporation have only those powers conferred upon them by statute or by the by-laws of the corporation, or by authority of the board of directors.

Luse v. Isthmus T. & R. Co., 6 Or. 125.
Crawford v. Albany Ice Co., 36 Or. 535.
Harding v. Oregon-Idaho Co., 57 Or. 33, 41.

VI.

No officer of the corporation, even the board of directors, may dispose of the assets of the corporation without consideration.

Bassick v. Aetna Explosives Co., 246 Fed., 974.

VII.

The burden is upon the libellants to prove the authority of Green to waive the lien of the Coast Shipbuilding Company.

Bagot v. Inter-Mountain Milling Co., 100 Or. 127.
Baker v. Seaweard, 63 Or. 350.
Reid v. Alaska Packing Co., 47 Or. 215.

VIII.

The mortgage to the trustee is void as to the Bankers Discount Corporation, inasmuch as it is an attempt on the part of the owners of the boat to create preference in themselves as against other lien claimants.

IX.

The mortgage is void as a preferred mortgage for the reason that it does not comply with the Ship Mortgage Act of 1920.

41 Statutes at Large, 1000.

X.

Intervening Libellant Mason has no lien as it affirmatively appears that the moneys advanced by him were on the behalf of the mortgagee.

XI.

All items of Mason's lien other than the $6600.00 are not lienable as the disbursements were incurred at his direction after he had taken charge of the ship.

ARGUMENT

The Trustee's mortgage is not entitled to a Preferred Status under the Ship Mortgage Act of 1920.

There is no allegation and no proof that the libellant's mortgage is a preferred maritime mortgage. Compliance with the provisions of the Ship Mortgage Act of 1920 (41 Stats. L. 1000) is not pleaded nor is there any proof of such compliance. Each and every element of sub-section D must be pleaded and proved in order to sustain a claim that the mortgage is entitled to a preferred status, for the reason that the statute provides that any valid mortgage * * * shall in addition have in respect to said vessel and as of the date of the compliance with ALL of the provisions of this sub-division the preferred status given by the provisions of subsection M IF.

1. The mortgage is endorsed upon the ship's documents in accordance with the provisions of this section;

2. The mortgage is recorded as provided in subsection (C) together with the time and date when the mortgage is so endorsed;

3. An affidavit is filed with the recording of such mortgage to the effect that the mortgage is made in good faith and without design to hinder, delay or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel;

4. That the mortgage does not stipulate that the mortgage waives the preferred status thereof;

5. The mortgagee is a citizen of the United States.

There is no pleading or proof that the mortgage is or was endorsed upon the ship's documents as provided in (c) of that section, nor is there pleading or proof that the mortgagees are citizens of the United States.

Where one claims that a ship mortgage has a preferred status he must plead and prove that each and every of those things have been done which the statute provides must be done in order to entitle the mortgage to that status.

Again, even a preferred ship mortgage does not take precedence over maritime liens as appears from an examination of Sub-section M of the Act.

It is necessary therefore that the mortgagee establish not only that his mortgage has a preferred status, but also that the lien of the Coast Shipbuilding Company has been waived by the act of an agent authorized so to do.

This burden of proof rests upon the libellant.

WAIVER BY COAST SHIPBUILDING COMPANY.

It appears from the record that at the meeting of the shareholders held on February 24, 1921, when it was determined that the $35,000.00 should be raised among them and secured by a mortgage on the ship, Mr. Donald Green, who was the secretary of the shipbuilding company, informed the shareholders that this mortgage would be a first mortgage, or first lien on the ship. There is some testimony from some of the shareholders that Mr. Green specifically stated that the Coast Shipbuilding Company would waive its lien. This is denied by other shareholders (Edward Ehrman, Apostles, 109). Green admits that he told the meeting that the mortgage would be a first claim on the ship but denies that he ever waived the Coast Shipbuilding Company's lien. (Apostles, 161.)

The question to be determined is whether Green had any authority from his principal to make such statement and whether the Coast Shipbuilding Company or the Discount Corporation is bound thereby.

It may be predicated that not even a general agent, the president, secretary, treasurer, or even the board of directors of a corporation have a right to dispose or give away the assets of a corporation without consideration, or upon a grossly inadequate consideration.

"As a general rule it is not within the power of the officers or agent of a corporation to give away its assets or property, and this rule applies to the corporate directors, the president or general manager, and unless authorized by the directors the president or other officer has no power to dedicate corporate lands to public use."

14a C. J. 420.

An instructive case upon this question is the late Federal decision of,—

Bassick v. Aetna Explosive Co., 246 Fed. 974.

There the president of the corporation had entered into a contract with certain brokers to pay them exhorbitant commissions for the sale of explosives during the war, and had in addition agreed that the brokers could retain as their own any sums which they might obtain over a certain price. As a result the brokers received nearly thirty per cent of the price for which the explosives sold. Afterwards the Board of Directors ratified the contract with the brokers upon the representation that they were in honor bound so to do because the president had made the contract.

The court in holding that the corporation was not bound thereby lays down the following wholesome rule:

"It is in the ultimate interest of business and the projection and prosecution of enterprises that the investing public must feel confident that a just appeal to the courts will not go unheeded and that the courts will not permit their property to be disposed of under circumstances which amount to a gift and those dealing with corporations cannot rely in such event upon the proposition that a board of directors has power in law to authorize a gift. Doubtless a natural person in the absence of fraud or duress can give away his property. Not so with the directors of a corporation as to corporate property."

In the case at bar the act of Green amounted to a gift of the property of the corporation. The corporation had no knowledge of the gift, and such knowledge cannot be presumed for the reason that it had already contracted to assign its claim to the Discount Corporation. The Board of Directors never authorized or ratified the act of Green, who was himself a minor stockholder, his act was not for, but against, the true interests of the Coast Shipbuilding Company, and in direct contravention of a contract which it had already made with regard to the lien.

In addition to the foregoing, the Bankers Discount Corporation was a creditor of the Shipbuilding Com-

pany, and as such creditor had the right to have its assets preserved and not dissipated.

Assuming for the purpose of argument that Green as secretary had as great power and authority as he would have had if he had been president of the concern, still the libellants cannot recover upon the claim of waiver.

First, let it be said that neither the secretary or treasurer of a corporation has power to assign choses in action belonging to the corporation unless such authority is expressly or impliedly conferred, and this goes so far that it has been held that the treasurer of a corporation has no power to assign a mortgage given to the corporation.

Holden v. Phelps, 135 Mass. 61.

Jackson v. Campbell, 5 Wend. (N. Y.) 572.

The president of a corporation has no power by virtue of his office to sell or otherwise dispose of the corporate franchise, or its real or personal property when this is not in the regular course of the company's business, nor can he appoint an agent to make such sale, and it has been held that he has not such power even though he is authorized to act as superintendent or general manager in the conduct of the corporation's ordinary and routine business.

14a Corpus Juris 416.

Integrity Min. & Co. vs. Moore, 130 Mo. App. 627.

East Cleveland R. Co. v. Everett, 19 Ohio Cir. Ct. 205.

The Coast Shipbuilding Company is an Oregon corporation, therefore the powers of its officers are those which are conferred by the laws of Oregon and defined by the decisions of its courts.

It might readily be assumed that the President of a corporation and its general executive would have greater power than a mere Secretary, who by the provisions of the by-laws alone had power to act as a clerical officer; but the powers of the President are greatly circumscribed by the laws of the State of Oregon. The first case upon the subject in Oregon is that of:

Luse v. Isthmus T. & R. Co., 6 Or. 125, 131.

There the President of the corporation on its behalf executed a chattel mortgage upon two of its locomotives and the corporation resisted an action to obtain possession of one of the locomotives upon the ground that the act was beyond the powers of the President. The Supreme Court affirmed the decision of the lower court, denying the validity of the mortgage in this language:

"Referring to the general incorporation law of this state, section 9, we find that the President of a corporation is authorized to preside at the meetings of the directors, and 'to perform such other special duties as the directors may authorize'. By Section 11 he is authorized to act as inspector of corporation elections, and to certify who are elected directors. No other authority seems to be conferred by the general law on the President of the corporation. All other authority, except to preside at the meeting, be inspector of elections, and certify who are elected directors must be derived from some by-law of the corporation, or some special order, or must be implied by some acquiescence or ratification on the part of the corporation, whose powers under our law are exercised by the directors.

"In this case, then, the fact that Utter was President did not, itself, imply the authority claimed for him. What power he had must be found confirmed, as this case is presented by the by-laws. These simply appoint him, according to the finding, 'business and financial agent'. Do these terms imply an authority to mortgage the property of the corporation? A great variety of acts may unquestionably be included within the function of a 'business and financial agent'. But this court, in Fink v. Canyon Road Co., 5 Or. 305, indicated what ought to be the limitation of the authority of

such agents. It said: 'Corporations are certainly bound by (132) their simple contracts, and by other acts of their officers and agents made and performed in the discharge of their ordinary duties; and the courts have carried this doctrine so far as to hold that they may take notice of the general nature of the duties of a cashier, in and about a banking office, and without evidence of usage or express authority, hold him authorized to do all incidental acts necessary to the performance of those general duties. (Watson v. Bennet, 12 Barb. 196.) This case presses closely upon the very verge of the law, and further we think the courts ought not to go.'

"The doctrine here recognized is that the acts of a general agent, which will be binding on the corporation without express and special authority, and acts done in the discharge of 'ordinary duties'. And Mr. Redfield holds, 2 Redfield on Railways, 582, that the general business agents of a company have only authority to transact those functions of the company which come under the general denomination of business. All the business of a company does not imply anything but ordinary business, 'what is called the proper business of such a company', that is, in the case of a railway, the construction and operation of their road. It requires no argument or evidence, we

think, to render it apparent that this attempt of Utter to mortgage,—in effect to sell—the locomotive which was in actual use on the company's road, for a precedent debt, was beyond and outside of the ordinary business of the corporation. It was not necessarily incident to the construction or operation of the company's road, but was rather a stride in the direction of annihilating its business, and defeating the operation of the road."

The doctrine here recognized is that the acts of the general agent which will be binding upon a corporation without express or established authority are acts done in the discharge of "ordinary" business.

The Luse case was followed by:

Crawford v. The Albany Ice Co., 36 Ore. 535 in an opinion by Judge R. S. Bean, now of the Federal Bench. There the President and Secretary of the corporation had executed a note for $255.00. An action was brought upon the note, the company denied the authority of its officers to make the note, and the trial court found for the company. In affirming the decision the Supreme Court uses the following language, which is particularly pertinent to the case at bar:

"It is elementary law that the President and Secretary of a corporation, as such, have no power to bind the corporation by the execution of prom-

issory notes or other contracts, but such authority 'must be derived from some by-law of the corporation, or some special order, or must be implied by some acquiescence or ratifications on the part of the corporation, whose powers, under our law, are exercised by the directors': Luse v. Isthmus Transit Ry. Co., 6 Or. 125, 131, (25 Am. Rep. 506); Blood v. La Serena L. & W. Co., 113 Cal. 221 (41 Pac. 1017, and 45 Pac. 252); Lyndon Mill Co. v. Lyndon Literary & Biblical Inst., 63 Vt. 581 (22 Atl. 575); People's Bank of New York v. St. Anthony's Catholic Church, 109 N. Y. 512 (17 N. E. 408); Leggett v. New Jersey Mfg. & Bank. Co., 1 N. J. Eq. 541 (23 Am. Dec. 728); Dabney v. Stevens, 40 How. Prac. 341. It is expressly admitted that Crawford and Stockman had no direct authority from the corporation to execute the note, and there is no evidence of an implied authority to do so. So far as the record discloses, this was the only promissory note ever executed by them or anyone else for or in behalf of the corporation, and is the only instance in which such officers attempted to bind it by contract. There is, therefore, no room for the argument that the note was executed by the express or implied authority of the corporation.

"But the main contention of the plaintiff is that its execution was subsequently ratified. Upon this

point the evidence and the offers to prove show that the note was given to Casey for a debt due him from the corporation for labor and services rendered, and that two of the five directors, besides Crawford and Stockman, subsequently knew of its execution, and never expressly disaffirmed or objected to it. But this is not sufficient evidence of a ratification to bind the corporation. A ratification by a principal of the unauthorized acts of an agent must be shown either by express words or by some act or conduct on his part, after full knowledge of the facts, inconsistent with any intention other than the adoption of such act as his own; and, in case of a corporation, by proving that the officers who had the power in the first instance to authorize the act, with a full knowledge on their part of all the material facts, adopted it as the valid act of the corporation. It is true, such a ratification need not be in express words, but may be inferred from corporate acts inconsistent with any other supposition than that the ratification to prove that the proper officers of the corporation, having such knowledge, acquiesced in and adopted the acts of the agent; and there is no proof of that character in this case: Murray v. Nelson Lum. Co., 143 Mass. 250 (9. N. E. 635); Howe v. Keeler, 27 Conn. 538. Where, as in Finnegan v. Pacific Vinegar Co. 26 Or. 152 (37 Pac. 457), the proper corporate officers, with full knowledge of all the

facts, accept the benefits or consideration of an unauthorized contract made in its behalf by one of its officers, the corporation thereby adopts the act as its own, and its assent and ratification will be presumed; but here the note was given on account of a pre-existing debt, and, if it was unauthorized at the time, the mere fact that the officers of the company may have known of its execution, and did not expressly disaffirm it, would manifestly not make it the binding obligation of the corporation in the hands of one who took with full knowledge of the circumstances under which it was executed, as is admitted in this case."

Again, in—

Harding v. Oregon-Idaho Co., 57 Or., 33, 41,

it was sought to bind the defendant corporation by the acts of its President in ordering certain goods, wares and merchandise. The lower court found that the defendant corporation and its President were jointly engaged in getting out sawlogs and in manufacturing lumber therefrom. That the President was the principal owner of the capital stock of the defendant and by consent and agreement of the defendant the President was in control of its property and acting as its agent and had agreed with the plaintiff that the merchandise furnished by him to the employees of the defendant should be charged to and paid out of the wages of the employees. The plaintiff sought to bind the cor-

poration by declarations of the President as to its authority. The Supreme Court reversed the case, saying:

> "Ferbrache is not a party to this action, and his acts and declarations, made while acting outside of his duties and authority as an officer of the defendant, are not competent evidence against it.
>
> "The authority of the agent cannot be shown by the alleged agent's own statements or acts, unless it be shown that the principal knowingly acquiesced therein: Connell v. McLoughlin, 28 Or. 230 (42 Pac. 218); Harrisburg Lumber Co. v. Washburn, 29 Or. 150, 163 (44 Pac. 390); Wicktorwitz v. Ins. Co., 31 Or. 569 (51 Pac. 75); Hannan v. Greenfield, 36 Or. 97, 103 (58 Pac. 888); Sloan v. Sloan, 46 Or. 36, 39 (78 Pac. 893).
>
> "Neither does the office of President of a corporation confer authority to bind the corporation or control its property; 10 Cyc. 903; Wait v. Nashua Armory Ass'n, 66 N. H. 581 (23 Atl. 77); 14 L. R. A. 356; 49 Am. St. Rep. 630; Lyndon Mill Co. v. Lyndon Literary Inst., 63 Vt. 581 (22 Atl. 575; 25 Am. St. Rep. 783). The President's power as an agent must be sought in the organic law of the organization—the by-laws—or in some special order of its board of directors, or must be implied by some acquescence or ratification on the part of the corporation, whose powers are, under

the law, exercised by the directors: Crawford v. Albany Ice Co., 36 Or. 535, 537 (60 Pac. 14)."

In the case at bar it appears from the testimony of Green the corporation had sold and disposed of practically all of its assets in order to get the money to complete the repairs and alterations to the "Egeria". Its claim for a lien upon the ship was practically all of its assets. It had already agreed to assign its claim to the Bankers Discount Corporation. The Shipbuilding Company and the Bankers Discount Corporation were in an infinitely better position with the lien on the ship as it then existed than they would be if they waived the lien and a mortgage was put upon the ship superior to the lien. By foreclosure of the lien they would have received their money or the ship would have been sold and the shareholders shut out from any further interest in the ship. This lien was a property right, and an asset of the corporation. The waiver of it constituted a gift of that claim and property and a diminution of the assets of the shipbuilding company. No authority was ever claimed by Green to waive the company's lien. No authority was granted to Green to make the waiver. His acts were never ratified by the company, it had no knowledge of the waiver, and neither the appellant Bankers Discount Corporation or the Shipbuilding Company ever received any benefits from the waiver or had knowledge of any benefits accruing to them or either of them. Nor had there ever been any course of

dealing from which the trustee or the shareholders advancing the $35,000.00 could have implied that Green possessed such authority. We have found no case where under like circumstances the courts have held that a corporation could be bound by the acts of an auauthorized agent to the disposition of its assest in such manner. There is no parallel between this case and those where a corporation has permitted an officer to enter upon a course of dealing with the public by reason of which it is estopped to deny his authority. Green had never assumed or pretended to assume like authority prior to this occasion and there is no evidence that his assumption of authority was ever brought to the attention or ratified by the Coast Shipbuilding Company.

These earlier decisions have been uniformly followed by the Oregon courts. In,—

Wilson v. Investment Co., 80 Or. 233,

the plaintiff brought action for work done upon a house owned by the defendant corporation. It was stipulated that the defendant corporation was the holder of the legal title to the house and that one Faber had ordered the plaintiff to do certain work on the structure and that the president of the corporation had stated that the bill was just and that the company would pay it. A verdict was had for the plaintiff, but the Supreme Court reversed the case, reiterating the Oregon rule with such clarity that we quote it at length:

"We come, then, to the question of liability of the Investment Company. Plaintiff appears to have based the obligation of the corporation upon the alleged language and promises of Quackenbush as president, but the record is absolutely silent as to his authority to bind the company. The mere fact that a man is president of a corporation does not give him any power to bind the corporation in any way. His powers are clearly defined in Sections 6691 and 6693, L. O. L., of which the former provides that he shall preside at meetings of the directors and perform such other special duties as the directors may authorize, and the latter section empowers him to act as inspector of elections. Speaking upon this point, in Luse v. Isthmus Transit Co., 6 Or. 125 (25 Am. Rep. 506), Mr. Justice Shattuck says:

" 'Referring to the general incorporation law of this state (section 9), we find that the president of a corporation is authorized to preside at the meetings of the directors, and 'to perform such other special duties as the directors may authorize.' By Section 11 he is authorized to act as inspector of corporation elections, and to certify who are elected directors. No other authority seems to be conferred by the general law on the president of the corporation. All other authority except to preside at the meeting, be inspector of elections, and certify

who are elected directors, must be derived from some by-law of the corporation, or some special order, or must be implied by some acquiescence or ratification on the part of the corporation, whose powers under our law are exercised by the directors.'

"This ruling has been emphasized in Crawford v. Albany Ice Co., 36 Or. 535 (60 Pac. 14); Harding v. Oregon-Idaho Co., 57 Or. 34 (110 Pac. 412), and Peek v. Skelley Lumber Co., 59 Or. 374 (117 Pac. 413); and such authority must be disclosed by the evidence. We have searched the record in this case in vain to find evidence, either of any by-law of the corporation, any special order of the directors, or anything in the way of usage or custom of the company, authorizing the President to bind the same by contracts."

Again in,—

Bell & Co. v. Vogt, 87 Or. 102, 104,

where the President and Secretary of a corporation had executed an assignment for the benefit of its creditors the Supreme Court reversed the lower court and held the document void, saying:

"This instrument cannot avail plaintiff as the foundation of its suit for the reason that it affirmatively appears from the reading of the evidence that the corporation had never authorized its Presi-

> dent and Secretary to execute the same, and it has been decisively held by this court that under such circumstances the document is of no force or effect. Luse vs. Isthmus T. R. Co., 6 Or. 125 (25 Am. Rep. 506); Wilson v. Investment Co., 80 Or. 233."

The burden is upon the libellant to show that Green had authority from the shipbuilding company and not upon the Bankers Discount Corporation to prove that he did not have such authority. This rule is also affirmatively established in Oregon.

> Bagot vs. Inter-Mountain Milling Company, 100 Or. 127, 131.

This was a contract in which McKinnon, a salesman of the defendant, entered into a contract to deliver two carloads of flour to the plaintiff. There was no proof of the authority of the salesman to bind the corporation. The court, speaking through Mr. Justice Johns, says:

> "The defendant is a corporation and can only act through its agent and officer and the burden of proof was upon the plaintiff to show that McKinnon was authorized to make such contract or that by its conduct the defendant is estopped to deny his authority."

The court then cites Baker vs. Seaweard, 63 Or. 350, to the effect that:

"A principal is not bound by the acts of his agent unless within the real or apparent scope of such agent's authority. *One dealing with an agent is bound at his peril to ascertain the extent of the agent's authority, and is chargeable with knowledge thereof.*"

In the Baker case, *supra,* the defendant had conferred upon his agent the authority to give checks to pay sheep herders and to purchase supplies and any ordinary expenses for a band of sheep. The agent thereupon purchased some horses and issued a check which was cashed and the principal brought suit for the amount of the check. A verdict was given against the defendant, and the Supreme Court reversed the case, using the following language:

"We will first ascertain the law as to the agency, and who must determine the issues thereunder. It may be stated generally that a principal is not bound by the acts of his agent, unless within the real or apparent scope of the authority of such agent; and one dealing with the agent is bound, at his peril, to ascertain the extent of the agent's authority, and is chargeable with knowledge thereof. Reid v. Alaska Packing Co., 47 Or. 215 (83 Pac. 139). And where a party relies upon a contract made with a person claiming to be an agent of another, he must prove, where the agency is dis-

puted, that he was expressly empowered to make the contract, and that its terms were within the scope of his authority. Rumble v. Cummings, 52 Or. 203 (95 Pac. 1111).

We call the court's attention to the case of Reid v. The Alaska Packing Company, 47 Or. 215, wherein it was held that the Secretary of a corporation whose duties are prescribed by the by-laws is without authority to ratify an unauthorized contract made by the agent of the corporation. We have taken the liberty to quote at length from Oregon decisions that are not only strictly in point, but because the Laws of Oregon are decisive in this case and are binding upon this court. The Shipbuilding Company is an Oregon corporation. The declarations of Green were made in Oregon. The trustee and shareholders are residents of Oregon and the mortgage was given in Oregon. But powers of an officer of an Oregon corporation are limited, by the laws of this state, and the decisions of its courts as to the effect of these laws and the nature and extent of the powers of officers and agents of its corporations are final, and it can make no difference that the courts in other jurisdictions may have adopted a more liberal rule. This case does not present the usual situation that arises where an officer of a corporation has attempted to waive a property right of a corporation. Donald Green was only the Secretary of the Shipbuilding Company. He owned but a small portion of its capital stock. Two-

thirds of the capital stock was owned by the estate of Harry Pennell and by C. E. McCulloch. Green in making the statement was not transacting the business of the Coast Shipbuilding Company. The Coast Shipbuilding Company received no consideration in the premises and it had already assigned and pledged its interests in the claim to the Bankers Discount Corporation, although the formal assignment was not executed until some time later. The appellant, Bankers Discount Corporation, has acted at all times in good faith. It was by its funds that the repairs and alterations to the ship were completed, that the insurance premiums were paid, and that the crew were paid when the ship returned from its trip to Australia. It had no interest in the ship or in the profits which the shareholders assumed would be theirs by reason of its operation. Upon what equitable principle can a claim of lien by the shareholders, who are co-partners to themselves, be preferred over a claim of a corporation which has furnished the funds which protected their interests and without which the vessel could not have been completed, which enabled the ship to go to sea, and which paid the insurance premiums and $10,000.00 for the wages of its crew?

LIEN OF JAMES MASON

The lien claimed by Mason consists of a large number of items which we schedule:

Advanced by Mason as Trustee for the mortgagee	$6,600.00
Advanced to the Master	53.86
Telegrams sent to Master at San Pedro	40.00
Expenses of Mason in going to San Pedro	317.65
Internal Revenue Tax on Mason's note to the U. S. Bank	1.50
Towage from Sand Island to Astoria	82.40
Towage from St. Johns to Portland Lumber Company	82.40
Pilotage	50.00
Pilotage moving vessel from St. Johns to permanent berth	15.00
Watchman hired by Mason	200.00
Berthing vessel	89.00
Interest on note to U. S. Bank	45.20
Multigraphing Letters to Shareholders	28.36
Multigraphing Letters to Shareholders	20.66
Laundry on ship blankets after she was laid up	38.65
Dockage	48.24
Repair St. Helens Shipbuilding Company	100.84
Coal Oil	2.55

It appears that Mason went to San Pedro at the request of the mortgagee and acting for him to release

the vessel from the liens filed by seamen and ship chandlers. He advanced $6,600.00 for this purpose. As trustee for the mortgagee, Mason's Exhibit 7, he took personal charge of the ship, directed her to proceed to Portland and the expenses other than the $6,600.00 were the result of those directions given by him. It is obvious that these are not lienable items, and assuredly interest paid upon the note to the United States Bank, expenses for telegrams, and traveling expenses of Mason personally are not items of lien. It is only as to those items covered by Mason's Exhibit 7 that there is any evidence that they were advanced on the exclusive use of the "Egeria". All other expenses were incurred by Mason and the Trustee upon their own initiative and their own responsibility. Nor can it be maintained that the item of $6,600.00 is a maritime lien in Mason's favor. Exhibit 7 recites that Mason as Trustee for the mortgagee has advanced this sum. This might entitle the libellant as trustee to tack the $6,600.00 to his mortgage, but it does not give to Mason an independent lien.

STATUS OF TRUSTEE'S MORTGAGE

In no event is the mortgage of the trustee good as against the appellant. This is a mortgage given by the owners of the boat to themselves. It may create a lien in favor of the contributing shareholders as against the non-contributing shareholders, but cannot be a lien as to

third persons. There is no principle of law whereby the owners of a boat or part of it can prefer themselves as against persons having a lien for repairs and alterations.

We submit that the decree of the court in so far as it gives the mortgage of the trustee priority over the Bankers Discount Corporation, and inasmuch as it gives priority to the Mason claim over that of the Bankers Discount Corporation is manifest error, and the lower court should be reversed and a decree entered providing that the Bankers Discount Corporation has a prior lien over both the trustee and Mason.

Respectfully submitted,

WINTER & MAGUIRE,
Proctors for Bankers Discount Corporation
and Coast Shipbuilding Company.